ARUMUGAM PONUSAMY

v.

KARUPIAH RAMASAMY & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-199-2001]
21 NOVEMBER 2005

TRUSTS: *Trustees - Removal - Power of court - Considerations - Friction between trustees and beneficiaries, whether a good ground - Whether proposed selling-price of trust land below market value - Whether trial judge committed any appealable error in considering evidence - Whether appellate intervention necessary*

This was an appeal from the decision of the High Court dismissing the plaintiff's action to have the 1st, 2nd, 3rd and 4th defendants removed as the trustees of a piece of land. The plaintiff claimed that the said defendants were not acting in the best interests of the beneficiaries because the proposed sale of the trust land to the 6th defendant was at a price below the market value and was not *bona fide.*

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

[1] The learned trial judge had carefully scrutinised the facts and there was no evidence to suggest that the proposed sale was at a price below the market value. That there appeared to be some friction or hostility as between the said trustees and the beneficiaries was also not a reason, on its own, to have the trustees removed. There was no 'appealable' error on the part of the trial judge. (pp 808 g-h & 809 a-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak tuntutan plaintif untuk menyingkir defendan-defendan pertama, kedua, ketiga dan keempat sebagai pemegang amanah kepada sebidang tanah. Plaintif mendakwa bahawa defendan-defendan tersebut tidak bertindak untuk kepentingan benefisiari-benefisiari dengan sebaik-baiknya, disebabkan cadangan penjualan tanah tersebut kepada defendan keenam adalah pada harga di bawah harga pasaran dan tidak dibuat secara *bona fide.*

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

[1] Yang arif hakim telah meneliti dengan halus fakta-fakta dan mendapati tidak ada keterangan yang menunjukkan bahawa cadangan penjualan adalah pada harga di bawah harga pasaran. Kewujudan pertikaian atau permusuhan di antara pemegang-pemegang amanah dan benefisiari-benefisiari juga bukanlah sebab, atas alasan itu semata-mata, untuk menyingkir pemegang amanah. Tidak terdapat sebarang kekhilafan yang boleh dirayui yang dilakukan oleh hakim bicara.

Case(s) refered to:
Khaw Cheng Bok v. Khaw Cheng Poon [1998] 3 MLJ 457 ***(foll)***
Letterstedt v. Broers & Anor [1884] 9 AC 371 ***(foll)***

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 48, para 783

For the appellant - Malik Imtiaz Sarwar (Ang Hean Leng with him); M/s Malik Imtiaz Sarwar
For the 1st-3rd respondents - Hamid Sultan Abu Backer (Francis Brigged with him); M/s Francis Brigged & Co
For the 5th respondent - M Palanimmah; M/s Pala Mutu
For the 6th respondent - Conrad Young; M/s Sivanathan

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S3-24-2393-1993]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
This appeal is singularly devoid of any merit. It has to do with the discretion vested in the High Court to direct the removal of a trustee. The trust in the present case is an express trust. The subject matter of the trust is a piece of land which is owned by the Malaysian Dravidian Association having some 100 members. Let me now briefly explain how the trust was created.

There was an earlier suit brought by the 5th defendant in the court below. That suit was compromised. The compromise was recorded in the form of an order of the High Court. By the terms of the compromise the 1st to 4th defendants were constituted as trustees of the subject land under an express trust. These defendants then proceeded to negotiate the sale of the land to a

company called Saweena Group Sdn Bhd which intervened in proceedings in the court below. A sale and purchase agreement was entered into. The plaintiff was unhappy with the amount of the purchase price. He thought it was too low; that it did not reflect the true market value of the land; that it was at undervalue and not *bona fide*. Acting in a representative capacity he took out a summons to remove the 1st to the 4th defendants because he thought that they were not acting in the best interests of the beneficiaries. The learned judge who heard the summons dismissed it. He also directed the trustees to complete the sale. The plaintiff says that the judge was wrong. At the conclusion of argument my learned brothers and I did not agree. We dismissed the appeal. My reasons for dismissing the appeal are as follows.

Historically, it was the Court of Chancery which recognised and gave effect to the device of a trust (originally termed a use during the reign of Henry VIII) and exercised supervisory jurisdiction over the trustees of a trust. Later, after the Judicature Acts of 1873-75, that jurisdiction was vested in the Chancery Division. By virtue of the Courts of Judicature Act 1964 read with the Courts Ordinance 1948, our High Court exercises the jurisdiction vested in the Chancery Division. It therefore has a general supervisory jurisdiction over trustees. This is quite apart from the statutory jurisdiction vested in it by the Trustee Act 1949 (Revised 1978).

In accordance with modern equity jurisprudence, express trusts are all regarded as trusts for sale. A trust for sale is one under which the trustees are under a duty to sell with a power to postpone sale. This is because Equity always regarded a trust for sale as personalty and not realty, even where the subject matter of the trust was land. So too here.

The court's supervisory jurisdiction over trustees and its power to remove a trustee were considered by Jeffrey Tan J in *Khaw Cheng Bok v. Khaw Cheng Poon* [1998] 3 MLJ 457 where he referred to the following passage from *Halsbury's Laws of England* (4th ed), vol. 48 para. 783:

> The court will remove a trustee, including the trustee of a foreign settlement, where he refuses to execute the trust (*Palairet v. Carew* [1863] 32 Beav 564; *Luke v. South Kensington Hotel Co* [1879] 11 Ch D 121) or has mismanaged the trust (*Ex Parte Phelps* [1742] 9 Mod Rep 357; *Ex Parte Reynolds* [1800] 5 Ves 707; *Peatfield v. Benn* [1853] 17 Beav 522) or has disqualified himself by his circumstances or conduct from continuing to hold the office (*Millard v. Eyre*

[1793] 2 Ves 94) or may perhaps do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of sympathy with its objects (*A-G v. Hardy* [1851] 1 Sim NS 338 at p 357) and with the beneficiaries. A trustee will not, however, be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperilled the interests of the beneficiaries (*Re Bridgman* [1860] 8 WR 598).

Jeffrey Tan J then went on to say as follows:

Story's Equitable Jurisprudence, s. 1289 has the following commentary which was cited with approval by the Privy Council in *Letterstedt (now Vicomtesse Montmort) v. Broers & Anor* [1884] 9 AC 371:

> … it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

In *Yusof bin Ahmad & Ors v. Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, Chan Sek Keong J (as he then was) held that a trustee who failed to comply with the directions of the testator may be removed by the court even if no harm has been done to the beneficiaries or to the trust. 'Friction or hostility between trustees and the immediate possessor or the trust estate is not of itself a reason for the removal of the trustees' (*Letterstedt v. Broers & Anor* at p 389, per Lord Blackburn).

I do not think that I can usefully add anything to the learning contained in the judgment of Jeffrey Tan J on the point under discussion. All that is left is to see whether the test laid down in the authorities referred to in his judgment has been met by the particular and individual circumstances of the present instance.

The only real complaint of the plaintiff is about the purchase price. Now, it must be said at once in fairness to Hashim Yusof J (now JCA) who tried the case that in his judgment he applied a fine-tooth comb to the evidence of value presented to him; that he carefully scrutinised the facts before coming to the conclusion that there were no grounds at all for suggesting that the sale to the intervener was at undervalue. That is a conclusion with which I heartily agree. The other ground of complaint that was faintly suggested by learned counsel for the plaintiff in support of the appeal is that there was friction between the trustees and the beneficiaries. On the authority of *Letterstedt v. Broers* that is not a ground for removal.

All that needs to be added is that the intervener having dealt with the trustees as owners at law and at arm's length cannot be regarded as anything but a bona fide purchaser for value. Learned counsel for the plaintiff argued that this is incorrect because the intervener paid only 10% of the purchase price. But if you look at the facts carefully, you will find that the plaintiff entered a caveat which is probably the reason why the intervener did not want to risk its money by paying the balance. The plaintiff having caused the sale and purchase to be delayed by reason of his caveat cannot now say that the intervener did not pay the balance. He is the author of that circumstance.

At the end of the day, this is in reality an appeal against the exercise of discretion by the learned judge in the matter of the removal of a trustee. To succeed the plaintiff had to demonstrate that the judge committed an appealable error, such as taking into account irrelevant considerations or failing to take into account relevant considerations or asking himself the wrong question. That is a burden the plaintiff plainly failed to discharge in this appeal.

For the reasons already given, this is a hopeless appeal. It was dismissed without calling upon the respondents. The usual orders consequent upon a dismissal were made.

My learned brother Abdul Kadir bin Sulaiman JCA (now FCJ) and Abdul Aziz bin Mohamad JCA have seen this judgment in draft and have expressed their agreement with it.